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Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 239.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Plaintiff in Error,

AGAINST

CHARLES WILLIAM EDWARDS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

First Point.

The brief of counsel for defendant in error seeks to infer jurisdiction argumentatively from the record.

The brief submitted by Mr. Bayard contains an argument seeking to show that from the testimony of Edwards, the defendant in error, jurisdiction should be inferred.

Counsel argues "We find that Edwards not only had a residence in Delaware, but a home in Delaware, and furthermore openly expressed his intent to return to Delaware as his home. In other words, his domicile is affirmatively established in

Delaware, and his citizenship follows as a legal consequence."

But this is a mere argument, and this Court has explicitly held that jurisdiction cannot be inferred argumentatively. Jurisdiction cannot be inferred argumentatively either from the averments or allegations of the complaint, or from the testimony appearing in the record.

In *Brown* v. *Keene*, 8 Peters, p. 115, Mr. Chief Justice Marshall said:

"The decisions of this Court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

In *Robertson* v. *Cease*, 97 U. S., pp. 649–650, Mr. Justice Harlan said:

"In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or *the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record.*"

* * * * *

Here the only fact averred, or appearing from the record, is that Cease was a resident of Illinois; and we are, in effect, asked, in support of the jurisdiction of the court below, to infer argumentatively, from the mere allegation of 'residence,' that, if not an alien, he had a fixed permanent domicile in that State, and was a native or naturalized citizen of the United States, and subject to the jurisdiction thereof. By such argumentative inferences it is contended that we should ascertain the fact, vital to the jurisdiction of the court, of his citizenship in some State other than that in which the suit was brought. We perceive nothing in either the language or policy of the Fourteenth Amendment which requires or justifies us in holding that the bare averment of the residence of the parties is sufficient, *prima facie*, to show jurisdiction."

No fact, which in legal intendment constitutes citizenship, was sworn to by Edwards, the defendant in error.

Edwards testified: "One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware, and I had to go back and forth. My family were over in Delaware."

But there is no difference in meaning between the words "reside" and "live." See the definitions of the word "Live" in Webster's Dictionary, Worcester's Dictionary, and the Century Dictionary. And this Court has decided that "citizenship and residence are not synonymous terms." Mr. Bayard asks this Court to infer jurisdiction, because Edwards said, "One of the reasons I left the *New Haven Palladium* was, it was too far away from home," meaning, it is inferred, that Delaware was his home. But calling a place "*home*" does not imply a fixed, permanent domicile, nor should the use of the word "home form the basis of an argumentative inference that a man is a citizen of the place which he denominates "home." Wherever a man resides or has a residence, there is his home, and Worcester defines "*Live—3. To make one's abiding place or home; to abide; to dwell; to reside.*"

There are thousands of individuals in the United States who are not citizens of the States in which they respectively reside or have a home.

In New York City alone many well-known and conspicuous individuals have homes and fixed permanent homes on the Fifth avenue, and yet are citizens of the State of Rhode Island, and exercise political rights in that State, and pay personal taxes and vote in the City of Newport, Rhode Island.

The use of the word "home" by Edwards has not the peculiar magic asserted by his counsel.

Charles Richardson, one of the greatest of lexicographers, in the Pickering (1839) edition of his great dictionary, defines the word "*home*" as follows:

"*Home.—A. S. Haem*-Ger. *Heim*. Dut. *Heym*. Sw. *Hem*—from the A. S. *Haem-an*. Ger. *Heimen*-coire, cohabitare, to come together, to dwell together.

Wachter calls the Ger. *Heim* communis locus habitandi, a *common* place of dwelling, or a *common* dwelling-place.

A place of coming, assembling, dwelling together; the place where any one dwells or inhabits; habitation, or residence or abode."

The "Century Dictionary" tells us that the word "*Home*" is derived from the Anglo-Saxon *Ham*, a home, dwelling, and the Icelandic *heimr*, an abode, village; *heima*, home.

And the first definition given is "*A dwelling; the residence of a family or household.*"

It, therefore, follows that the word "*home*" is the equivalent of "*residence*" or "*dwelling.*"

A man may actually reside in one place, and have his home or residence there, and yet may have a domicil in another place, for as Story says in his *Conflict of Laws*, § 44:

"In many cases actual residence is not indispensable to retain a domicil, after it is once acquired; but it is retained, *animo solo*, by the mere intention not to change it or to adopt another."

Second Point.

An argumentative inference of jurisdiction is not permitted, because it would open the door to an evasion of the Constitution and laws of the United States.

In *Bernards Township* v. *Stebbins*, 109 U. S., at page 353, Mr. Justice Gray, in delivering the opinion of the Court, said:

"But, in the matter of the jurisdiction of the federal courts, the discrimination between suits

between citizens of the same State and suits between citizens of different States is established by the Constitution and laws of the United States. And it has been the constant effort of Congress and of this Court to prevent this discrimination from being evaded, by bringing into the federal courts controversies between citizens of the same State."

Cited with approval in *Shreveport* v. *Cole*, 129 U. S., p. 44.

Third Point.

The alleged declarations of Edwards, the plaintiff in the action, are not evidence, because facts or acts which in legal intendment constitute citizenship, must be proven and not mere declarations of the party.

Mr. Bayard, in his brief, says:

"There can be no question that the uncontradicted testimony of Edwards shows that *his home was in Delaware;* that *he lived in Delaware;* that *his family was in Delaware;* and that he had to *go back and forth from Delaware*, thus evincing not only the positive declaration as to his domicile, but also the positive declaration that in spite of his peregrinations, he was still *animo manendi* as to his domicile in *Delaware*, and a domiciled citizen of Delaware."

In one of the very cases cited by Mr. Bayard, *Lessee of Butler* v. *Farnsworth*, 4 Washington's Circuit Court Reports, pp. 103–104, Washington, *J.*, in delivering the opinion of the Court, said:

"It is true, that the intention of the party in changing the place of his residence, is a material ingredient in the question of citizenship, as it concerns federal jurisdiction. But this intention is to be collected from the *acts*, and not from the declara-

tions of the party. If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil, however frequent and public his declarations to the contrary may have been. If, on the other hand, the sincerity of the removal, for the purpose of permanently residing in the state which the person has selected, be not questioned, and his acts correspond with such purpose, the change of domicil is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicil; although he may have uniformly declared, as it is contended the lessor of the plaintiff has done, that he nevertheless considered himself as continuing a citizen of South Carolina. *It is a conclusion of law upon certain facts, which constitutes him a citizen of the state where he permanently resides; which neither his private intentions, nor his public declarations can alter.* Were it otherwise, a door would be opened for the grossest frauds upon the jurisdiction of the federal courts; since a person in the predicament stated might qualify himself to sue, or disqualify himself from being sued in those courts, by declarations known perhaps only to a few of his friends, though in manifest hostility to open and notorious acts, from which alone the world can judge of his intentions."

Fourth Point.

There is no evidence in the record showing that at the time of the commencement of the action Edwards had a home in Delaware or that he then lived in Delaware, or that his family were then over in Delaware.

The complaint, it is true, avers that "plaintiff is a resident of the State of Delaware," but in his tes-

timony he merely says: "One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware."

But there is nothing to show that Edwards commenced the action when he was on the *New Haven Palladium.*

And the diversity of citizenship must exist at the time of the commencement of the action, which is the time of the test.

In *Stevens* v. *Nichols* (decided April 1, 1889), 130 U. S., pp. 231–232, Mr. Justice Harlan, in delivering the opinion of the Court, said:

"2. The case was not removable from the State court, unless it appeared affirmatively in the petition for removal, or elsewhere in the record, *that at the commencement of the action, as well as when the removal was asked,* Stevens and Mirick were citizens of some other State than the one of which the plaintiff was, at those respective dates, a citizen. *Gibson* v. *Bruce*, 108 U. S., 561, 562; *Houston & Texas Central Railway* v. *Shirley*, 111 U. S., 358, 360; *Mansfield, Coldwater, &c., Railway* v. *Swan*, 111 U. S., 379, 381; *Akers* v. *Akers*, 117 U. S., 197.

3. The petition for removal does not allege the citizenship of the parties except at the date when it was filed, and it is not shown elsewhere in the record that Stevens and Mirick were, *at the commencement of the action*, citizens of a State other than the one of which the plaintiff was, at that date, a citizen. The Court, therefore, cannot consider the merits of the case." *Metcalf* v. *Watertown*, 128 U. S., 586; *Morris* v. *Gilmer*, 129 U. S., 315, 325.

In *Jackson* v. *Allen* (decided October 28, 1889), 132 U. S., p. 34, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

"It appears from the record that the citizenship of the parties *at the commencement of the actions*, as well as at the time the petitions for removal were filed, was not sufficiently shown, and that therefore

the jurisdiction of the state court was never divested. *Stevens* v. *Nichols*, 130 U. S., 230. This being so, the defect cannot be cured by amendment. *Crehore* v. *Ohio and Mississippi Railroad Co.*, 131 U. S., 240."

Fifth Point.

The decision of this Court in the case of Brown v. *Keene, 8 Peters, 112, is fatal to the argument of the defendant in error.*

In that case Mr. Chief Justice Marshall, in delivering the opinion of the Court, said:

"The petition avers, that the plaintiff, Richard Raynal Keene, is a citizen of the State of Maryland; and that James Brown, the defendant, is a citizen or resident of the State of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The petition, then, does not aver positively, that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either.

The additional words of description, 'holding his fixed and permanent domicil in the parish of St. Charles," do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the Court is sufficiently shown by these averments."

Idem, 114.

This case, therefore, holds that while *a citizen of the United States may become a citizen of that State* in which he has a fixed and permanent domicil, *a party to an action does not, necessarily, become a citizen of the State* by having such fixed and permanent domicil therein.

The reason of this rule is, that domicil does not depend on citizenship or on presence, for a man may be a citizen of one country, have his domicil in another country, and temporarily reside in a third country.

Having a permanent domicil and residence in the United States is not the equivalent of citizenship.

United States v. *Wong Kim Ark* (decided March 28, 1898), 169 U. S., 649.

There, Mr. Justice Gray, in delivering the opinion of the Court, said:

"The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth *are subjects of the Emperor of China, but have a permanent domicil and residence in the United States,* and are then carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment of the Constitution, 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'"

It should be noted that Edwards does not swear that he had any fixed and permanent domicil in Delaware. He merely calls it his home. It does not appear that he ever *attempted to exercise* any political rights or any rights of citizenship in that State or that he ever did exercise such rights. It does not appear that he ever voted or paid personal taxes within the State of Delaware; and it does not appear that he was not a citizen of the State of New York at the time of the commencement of the action.

In *Brown* v. *Keene*, the averment of the petition that "*James Brown, the defendant, is a citizen or resident of the State of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles,*" was much stronger than the averment in this case

that "*plaintiff is a resident of the State of Delaware.*"

An uncontroverted averment is taken as admitted, and so the averment of the petition that "James Brown, the defendant, is *holding his fixed and permanent domicil in the parish of St. Charles,*" had the same force and effect as though the evidence had disclosed such fact. And if an *admitted* averment of "fixed and permanent domicil" does not prove citizenship of the State in which the party has such fixed and permanent domicil, no testimony of like character, can establish citizenship.

Sixth Point.

The complaint contains no averment that the Sun Printing and Publishing Association is a citizen of the State of New York.

Even in respect to the citizenship of the plaintiff in error the complaint is inartificial and defective, because it fails in this essential averment.

Neither the place of organization nor the principal place of business is an absolute test of citizenship.

In *Union Pacific Railway Company* v. *Harris*, 158 U. S., p. 327, the complaint alleged Harris to be "a citizen of the State of Colorado" and complained of "the Union Pacific Railway Company, defendant, which was heretofore and now is duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the City of Omaha and State of Nebraska, and is now and was at the time and times hereinafter stated a citizen of the State of Nebraska."

The "principal place of business" of a corporation is no test of residence, whether of a corporation or of a natural person—as a person may reside in one State and have his principal or sole place of business in another State.

Guinn v. *Iowa Central R'y Co.*, 14 F., 323.

New York & N. E. R. R. Co. v. *Hyde*, 56 F., 188.

Dated, April 19, 1904.

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